United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6147

To be argued by
VICTOR J. ZUPA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6147

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

VARIOUS ARTICLES OF OBSCENE MERCHANDISE, SCHEDULE NO. 1350,
Defendants in rem,

FRED CHERRY,
Claimant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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Defendants in rem,

FRED CHERRY,
Claimant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE

Issues Presented

1. Did the District Court abuse its discretion by not allowing the Claimant in a jury trial to introduce a magazine, which the Claimant had purchased at Times Square, as evidence of the community standard?

2. Did the District Court abuse its discretion in denying the Claimant's request for an adjournment of the trial date for a period of 45 days in order to discover the name of the official at Customs who allegedly had approved the film "Sensations" when it was indicated that no official from Customs had approved this film?

3. Under 19 U.S.C. §1305 is an order form for material which the Claimant has admitted to be obscene and which is contained in the same package as obscene material, subject to forfeiture?

4. Is the magazine in question obscene?

Statement of the Case

This action was commenced on February 18, 1976 by the United States pursuant to 19 U.S.C. §1305 and the Supplemental Rules for Certain Admiralty and Maritime Claims. The complaint, among other things, seeks the forfeiture, condemnation, and destruction of an obscene magazine entitled "Sexual Instruction by: Susan" (the "magazine") and an order form supplemented by an illustration of the magazines listed in the order form.* All of these items were contained in an envelope which was posted from Denmark and addressed to the Claimant at an address within the United States. The Claimant admits that he ordered the magazine. (A13a).

A trial by jury was held on June 22, 1976 before the Honorable Irving Ben Cooper. The jury found the magazine to be obscene, and a judgment of forfeiture and condemnation was rendered by the District Court. (A63a). This is an appeal from that judgment.

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* The Claimant conceded that the illustrated supplement was obscene and consented to its forfeiture. (A13a).

ARGUMENT

POINT I

The District Court Acted Properly in Denying the Claimant's Request to Adjourn for a 45 Day Period the Trial of This Action in Order to Allow the Claimant to Discover the Name of the Official at Customs Who Had Allegedly Approved the Film "Sensations" When it Was Indicated That no Official From Customs Had Approved That Film.

In a letter to the District Court, dated June 5, 1976, the Claimant sought to postpone for a period of 45 days the date of trial in this action which had been set for June 10, 1976.* (A5a). The Claimant stated that he needed this time to serve written interrogatories on the plaintiff to obtain the name of the Customs official who had made the ultimate decision to allow the importation of the film "Sensations" which the Claimant alleged was more obscene than the magazine in question and which the Claimant stated supported his belief that Customs applies a double standard, i.e. a more lenient standard is applied to commercial importers than importers of material for personal use. (A6a). By letter of June 8, 1976, the Government stated to the Court that no Customs official had approved the importation of the film "Sensations". (A6c). On June 10, 1976, the scheduled date for trial, the Court adjourned the trial date to June 22, 1976, but denied any further adjournment as requested by the Claimant in his letter of June 5, 1976. (A7b).

In light of the representation by the Government in its letter of June 8, 1976, it was clear that to allow appellant

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* At the request of the Claimant the trial date for the material he claimed had previously been adjourned from April 12, 1976. (A 5a).

a 45 day adjournment of the trial date to discover the name of the Customs official that approved the film when in fact it had not been so approved, would have been an exercise in futility and a sheer waste of time. The District Court, therefore, acted properly in denying the Claimant's request for a 45 day adjournment of the trial date to discover this information.

POINT II

The District Court Acted Properly in Excluding the Magazine Which the Claimant had Purchased at Times Square as Evidence for the Jury of Contemporary Community Standards.

In an attempt to adduce evidence of contemporary community standards, pursuant to *Miller* v. *California*, 413 U.S. 15, 24-25 (1973), the Claimant sought at the trial to introduce a magazine he allegedly had purchased in the Times Square area, the contents of which he contended were comparable to the magazine seized by Customs. (A31a-32a). In this connection, this Court has said:

> "Obscenity, however, cannot be judged on a comparative basis. If the test were, is this film worse than many which are being shown in this metropolitan area, the answer would be negative. For some reasons films quite obviously obscene are being allowed, permitted or tolerated by local law enforcement agencies in certain areas and theatres but the existence of these enclaves does not create a community standard".

United States v. *One Reel of 35 MM Color Film Pic., Etc.*, 491 F.2d 956, 959 (2d Cir. 1974). Similarly, in *United States* v. *Various Articles of Obscene Merchandise*,

Schedule 1352, 76 Civ. 1000 (S.D.N.Y., May 6, 1976), the Court said:

> "At a more fundamental level, the problem with claimant's argument is that it equates community standards with the most pornographic items available for sale. Were this true a community would never be able to purge itself of obscene items currently in existence, and any practical or legal difficulties involved in the enforcement of obscenity laws would have to be interpreted as evidence of community acceptance. The demand for pornography, whatever its economic significance is not an adequate measure of the standards of a community which extends far beyond the confines of Times Square."

A court, however, may allow the introduction of similar evidence as to what the community standards are if it is established that the similar evidence has a reasonable degree of community acceptance. *United States* v. *Womack*, 509 F.2d 368, 375-378 (D.C. Cir. 1974). An expert witness is usually required to establish that the similar evidence is in fact accepted by the community. See *United States* v. *Menarite*, 448 F.2d 583, 593 (2d Cir. 1971), *cert. denied*, 404 U.S. 947 (1971); *United States* v. *West Coast News Company*, 228 F. Supp. 171, 195 (W.D. Mich. 1964), *aff'd*, 357 F.2d 855 (6th Cir. 1966), *rev'd on other grounds sub. nom. Aday* v. *United States*, 338 U.S. 447 (1967).* However, it is clear that the

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* On appeal, the Claimant suggests for the first time that as *a pro se* he should not be forced to undertake the burden and expense of securing an expert witness to testify on his behalf. Had the Claimant raised this at the District Court level, the court might have appointed an expert witness for him and had the costs shared by the parties in accordance with Rule 706 of the Federal Rule of Evidence. However, the Claimant's *pro se* status does does not entitle him to unduly prolong the judicial process by raising new issues at the appellate level which could have been resolved at the District Court level.

mere availability of similar materials does not show acceptance by the community. *Hamling* v. *United States*, 418 U.S. 87, 125-126 (1974). *United States* v. *Menarite*, *supra*, at 593. Here the Claimant sought nothing more than to show that because the magazine he sought to introduce was available for sale at Times Square it was evidence that the community had accepted that magazine and thus was indicative of the community standard. The District Court thus properly excluded the magazine from evidence.

POINT III

The District Court Acted Properly in Ruling That Under 19 U.S.C. §1305 the Order Form Inside the Package Which Contained the Obscene Material was Also Subject to Forfeiture and Condemnation.

19 U.S.C. §1305(a) provides for the forfeiture and seizure by Customs of all obscene articles imported into the United States from any foreign country. In addition the statute provides that:

> "No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were enclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained shall be subject to seizure and forfeiture as hereinafter provided. . . ."

Since the Claimant had ordered the magazine which was adjudged to be obscene by the jury, there can be no claim that that magazine was enclosed in the package without

the claimant's knowledge or consent. 19 U.S.C. § 1305 calls for the forfeiture of the entire contents of the package; the District Court did no more than give effect to the plain meaning of the terms of the statute.

In addition, attached to the order form was an illustration of the magazines listed in the order form. Since the Claimant had conceded that the illustration of the magazines that could be ordered via the order form was obscene (A13a), allowing the Claimant to have the order form would be inconsistent with the purpose of 19 U.S.C. § 1305 to prevent the entry of obscene articles into the United States.

While it appears that in *United States* v. *18 Packages of Magazines*, 227 F. Supp. 198 (N.D. Calif. 1963) the Court took a somewhat more restrictive view of 19 U.S.C. § 1305, that case can be distinguished in that it was not alleged nor shown at trial that the obscene portion of the package was enclosed with the knowledge or consent of the importer. 227 F. Supp. at 202.

POINT IV

The Jury Properly Concluded That The Magazine in Question is Obscene.

While *United States* v. *35 MM Motion Picture Film, Etc.*, 432 F.2d 705, 711 (2d Cir. 1970), cited by the Claimant in his brief, indicates that "the verdict of the jury can only be advisory at best" to this Court's review, that case was decided before the guidelines set forth in *Miller* v. *California*, 413 U.S. 15 (1973). In particular, the *Miller* case articulated the community standard test as vesting in the jury the duty to determine that standard. 413 U.S. at 26. See also *Hamling* v. *United States*, *supra*, 418 U.S. at 104-05. Thus, as this Court has made clear, it is the trier of fact that should decide if the *Miller*

guidelines have been met. *United States* v. *One Reel of 35 MM Color Motion Pic. Etc.*, 491 F.2d 956, 958 (2d Cir. 1974). A brief perusal of the magazine at issue is sufficient to establish that the jury properly concluded that it was obscene under the test set forth in *Miller*.

CONCLUSION

For the foregoing reasons the judgment of the District Court, and the underlying findings of the jury, should be affirmed.

Dated: New York, New York
December 29, 1975

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 29th day of December, 1976 she served two copies of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Fred Cherry
Olimpo Court Hotel
603 Miramar Avenue
San Tursi, Puerto Rico 00907

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

29th day of December, 1976

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978